

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8**

MAHONING AND COLUMBIANA TRAINING
ASSOCIATION

Employer

and

Case No. 8-RC-16250

OHIO COUNCIL 8, AMERICAN FEDERATION OF
STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,¹ the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The labor organization involved claims to represent certain employees of the Employer.

¹ The Parties have filed briefs which have been carefully considered.

3. No question affecting commerce exists concerning the representation of certain employees of the employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, for the following reasons:

The Petitioner seeks to represent a unit of employees – such as career consultants, job developers, and instructors – who are employed by the Employer. The petitioned-for Unit includes approximately 27 employees. The Employer argues that it is exempt from the Act’s coverage because it is a “political subdivision” under Section 2(2) of the Act.

The Employer is a “council of governments” under Chapter 167 of the Ohio Revised Code, which enables the “governing bodies of any two or more counties” to “enter into an agreement with each other...for establishment of a regional council consisting of such political subdivisions.” O.R.C. § 167.01. The Employer was formed on June 3, 1983, pursuant to an agreement between the Mahoning County Board of County Commissioners and the Columbiana County Board of County Commissioners in order to administer the federal Job Training Partnership Act (JTPA)² for Mahoning County and Columbiana County. The agreement was amended on January 25, 2000, in order for the Employer to administer the federal Workforce Investment Act (WIA),³ which replaced the Job Training Partnership Act. The Employer provides job training services, including job counseling and assessment, occupational classroom training, and on-the-job training, to residents of Mahoning County and Columbiana County.

The Employer is governed by an Executive Board⁴ consisting exclusively of the three Mahoning County Commissioners and the three Columbiana County Commissioners. The County Commissioners are elected public officials who serve four-year terms. See O.R.C. §

² Public Law 97-300 (October 13, 1982).

³ Public Law 105-220 (August 7, 1998).

⁴ Ohio Revised Code § 167.04 requires councils of governments to adopt by-laws creating a “governing board.”

305.01. They are not elected by the public to positions on the Executive Board. Rather, they serve on the Executive Board by virtue of their positions as County Commissioners. The County Commissioners are not compensated for sitting on the Executive Board. The record indicates that the County Commissioners, in their capacity as elected public officials and not as members of the Executive Board, have ultimate financial responsibility for funds received by the Employer through government grants. The Executive Board holds quarterly meetings, plus additional meetings as business requires. The meeting minutes are public records. However, these meetings are separate from the regular meetings of the Mahoning County Board of County Commissioners and the Columbiana County Board of County Commissioners, respectively.

The day-to-day operations of the Employer are managed by its Director, Ray McAtee. The Director reports to, and is subordinate to, the Executive Board. A human resource director administers the Employer's labor relations policies. Although the Employer's employees are not civil service employees, they are enrolled in Ohio's Public Employee Retirement System ("PERS"). The Employer sets its employees' wage rates, benefits and other terms and conditions of employment, which are different from those of county employees. The record establishes that the Executive Board must approve all of the Employer's hiring and discharge decisions.

The record establishes that all of the Employer's funding comes from government sources, primarily federal grants. In addition, the record indicates that the Employer is audited annually by the State of Ohio. The record does not conclusively establish whether the Employer is exempt from state or federal taxes, but it appears that it is exempt.⁵ The Employer has no power of eminent domain or power to collect taxes.

⁵ Regarding Employer's Exhibit 1(c), Notice of New Employer Identification Number, Director McAtee testified: "And I most frequently see it when we have to give exemption for taxes. It's a government entity." See also, Ohio Op. Att'y Gen. 71-010 (Regional councils of governments, authorized by O.R.C. Chapter 167, are political subdivision for purposes of sales tax exemption in O.R.C. § 5739.02(B)(1)).

The Workforce Investment Act (“WIA”) provides grants to assist states in workforce investment and development activities. WIA requires states to establish a state workforce investment board and to develop a 5-year strategic plan to be submitted to the Department of Labor. WIA also requires states to designate local workforce investment areas in which workforce activities are to be administered locally by local workforce investment boards. Local workforce investment boards, in partnership with local elected officials, are responsible for planning and overseeing the local program. However, Ohio legislation provides local areas the opportunity to adopt either the conventional WIA plan or to adopt the Ohio Workforce Strategic Option (“Ohio Option”).⁶ Under the Ohio Option, the chief elected officials of a local area must create a “workforce policy board” to administer local workforce activities.⁷

The local area consisting of Mahoning and Columbiana Counties has adopted the Ohio Option. At least 51% of its workforce policy board consists of individuals representing the business community. The remainder is made up of representatives of labor organizations, community groups and elected officials. All members of the workforce policy board are appointed by the Mahoning County Board of County Commissioners and the Columbiana County Board of County Commissioners. The workforce policy board works in conjunction with the elected officials of the local area on aspects of the Workforce Investment Act. The full workforce policy board has quarterly meetings, its subcommittees meet periodically, and its executive committee has monthly meetings. As a service provider for Columbiana and Mahoning counties, the Employer reports its activities to the workforce policy board during these meetings.

⁶ See O.R.C. § 330.02; O.R.C. Chapter 6301.

⁷ O.R.C. §§ 6301.01; 6301.06.

The record indicates that a petition was filed with the Ohio State Employment Relations Board (“SERB”) for an election among the Employer’s employees. The Employer opposed the petition, arguing that it was not a “public employer” as defined in O.R.C. § 4117.01(B). At the hearing in the instant case, the Employer’s attorney stated on the record that SERB dismissed the petition.⁸

Section 2(2) of the Act provides that the term “employer” shall include “any person acting as an agent of an employer, directly or indirectly, but shall not include...any State or political subdivision thereof...” Although the Act does not define what constitutes an exempt state political subdivision, the exemption historically has been interpreted to include only those entities which are either (1) created directly by the State, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate. NLRB v. Natural Gas Utility District of Hawkins County, Tennessee, 402 U.S. 600 (1971).

For an entity to be deemed administered by individuals responsible to public officials or to the general electorate, those individuals must constitute a majority of the entity’s board of directors. Enrichment Services Program, Inc., 325 NLRB 818, 819 (1998). The Board has suggested that “administration,” in this context, means “responsibility for day-to-day operations.” Correctional Medical Systems, 289 NLRB 810, 813-14, n. 2 (1988). In addition, the composition of the group of electors eligible to vote for the entity’s governing body must be sufficiently comparable to electors for general political elections. FiveCAP, Inc., 331 NLRB No. 157, slip op. at 3 (2000); Enrichment Services Program, Inc., 325 NLRB at 819.

All six individuals on the Employer’s Executive Board are county commissioners, elected to four year terms by the residents of their respective counties. Thus, a majority of the

⁸ The record does not indicate why SERB dismissed the petition.

Employer's governing board is responsible to the general electorate. Pennsylvania State Ass'n of Boroughs, 267 NLRB 71, 72 (1983)(association of boroughs a "political subdivision" where it was "governed" by officers and board of directors, all of whom must be either elected or appointed officials). Cf. Enrichment Services Program, Inc., 325 NLRB at 819 (one-third of governing board, comprised of state public officials and their representatives, deemed "responsible to public officials or the general electorate"). Although the second prong of Hawkins is not satisfied when the voters comprise only a limited group of voters, such as "representatives of the poor," ibid., it is not necessary for each board member to be elected by voters in the entire area serviced by the employer. Pennsylvania State Ass'n of Boroughs, 267 NLRB at 71, 72 (board members of multi-borough association only elected by voters from individual borough). Thus, the fact that citizens of Mahoning County are not eligible to vote for the Columbiana County Board of County Commissioners, and vice versa, is immaterial.

The Petitioner contends that the members of the Executive Board are not responsible to public officials or to the general electorate because they are not elected to the Executive Board, as such, but rather serve on the Executive Board by virtue of their positions as elected County Commissioners, pursuant to the Mahoning and Columbiana Training Association Agreement and O.R.C. § 167.02. The cases cited by the Petitioner in support of this proposition, however, are distinguishable. In Methodist Hospital of Kentucky, Inc.,⁹ some members of the hospital's board were elected public officials, but the city had no authority to decide the composition or structure of the board, whose members thus had no "direct personal accountability to the City or the general public." Id. at 1115. Thus, their membership on the board was coincidental with, but not required by, their status as public officials. In Cape Girardeau Care Center, Inc.,¹⁰ the county did

⁹ 318 NLRB 1107 (1995), *enfd.* in pertinent part 109 F.3d 1146 (6th Cir. 1997), *cert. denied* 522 U.S. 944 (1997).

¹⁰ 278 NLRB 1018 (1986).

not appoint the employer's directors, but simply approved their appointment. The county approval was not pursuant to a state statute or county ordinance, and although the employer's articles of incorporation stated that the county would appoint board members as vacancies occurred, the actual practice was that incumbent board members selected their successors subject to county approval.¹¹ In contrast, the agreement between Columbiana and Mahoning Counties that both created the Employer and required that the members of its Executive Board be County Commissioners, was entered into pursuant to county legislation and O.R.C. Chapter 167. The County Commissioners do not serve on the Executive Board by happenstance, or by virtue of corporate bylaws, but because the legislative action of two counties, pursuant to an enabling state statute, requires them to do so. Service on the Executive Board of the Employer is thus an official function of the County Commissioners, and they are politically accountable to the public. Under these circumstances, the Petitioner's argument is unpersuasive.

The Petitioner also argues that O.R.C. § 167.07 establishes that the County Commissioners do not act in their official capacity while serving on the Executive Board, so that while administering the Employer, they are not responsible to public officials or to the general electorate. Section 167.07 exempts members and officers of regional councils of governments, while acting in that capacity, from the conflict of interest provisions that otherwise apply to public officials or employees. See Ohio Op. Att'y Gen. No. 89-063 (1989)(pursuant to O.R.C. § 167.07, an executive director employed by a community mental health board does not violate the conflict of interest provision in O.R.C. § 340.02 by representing the board on a regional council

¹¹ Id. at 1019. See also Crestline Memorial Hosp. Ass'n, Inc. v. NLRB, 668 F.2d 243, 245 (6th Cir. 1982)(hospital's directors not responsible by law to electorate even though hospital's constitution permits all citizens of city to vote for them, because citizens' voting right derived from corporate constitution, subject to change at any time, and not from city or local laws); Southwest Texas Public Broadcasting Council, 227 NLRB 1560, 1562 (1977)(television station not a political subdivision where the Board found that "[s]ignificantly, both the representation of public

of governments which provides services to the board). The opening sentence of Section 167.07 states that “[m]embership...and holding an office of the council does not constitute the holding of a public office or employment.” However, when read in context with the remainder of the provision, the sentence is arguably limited to conflict of interest issues and is not determinative of the Executive Board members’ status as public officials under the second prong of Hawkins.

Regardless of the meaning of O.R.C. § 167.07, the Supreme Court in Hawkins stated that the Board is to look to the actual operations and characteristics of the entity, rather than to state law, to determine whether the entity is a political subdivision. Hawkins, 402 U.S. at 603-604. As discussed above, the members of the Executive Board are elected public officials who are politically accountable to the general electorate of their respective counties and who serve on the Executive Board because county legislation requires them to do so.

The Petitioner’s attempt to analogize the Employer with the employer in Enrichment Services Program, Inc., 325 NLRB at 819, is also unpersuasive. In holding that individuals elected to an entity’s governing board by “representatives of the poor” were not responsible to the general electorate, the Board focused on the composition of the electorate, not the composition of the individuals to whom services were provided, as the Petitioner asserts in its brief. Ibid.

The Petitioner’s contention that Director McAtee, and not the Executive Board, actually administers the employer, has no impact on my analysis. The record establishes that McAtee is subordinate to the Executive Board in the exercise of his duties as Director. See Pennsylvania State Ass’n of Boroughs, 267 NLRB at 72 & n. 6, 7.

institutions on the Employer's board of trustees and the number of trustees appointed by such institutions are determined solely by the Employer's own articles of incorporation”).

Finally, the record establishes that the Executive Board, and not the workforce policy board, administers the Employer. A majority of the workforce policy board is composed of private citizens.¹² Although the Employer reports its activities to the policy board under the WIA Ohio Option, the policy board's functions more closely resemble that of a coordinator of the various agencies in the Columbiana and Mahoning County area than of an administrator of the Employer.

Therefore, I conclude that the Employer is “administered by individuals responsible to public officials or to the general electorate,” and is thus a political subdivision under the second prong of Hawkins. Although the Board will find an entity to be a “political subdivision” if either prong of Hawkins is satisfied,¹³ I will next address whether the Employer is a “political subdivision” under the first prong of Hawkins.

The Board recognizes entities created by county governments, pursuant to an enabling state statute, as having been directly created by the State under Hawkins. Hinds County Human Resource Agency, 331 NLRB No. 186, slip op. at 1. The Employer was created by the governing bodies of Mahoning and Columbiana Counties pursuant to O.R.C. § 167.01. Therefore, the Employer was “directly created by the State” under Hawkins.

The Board considers several factors in determining whether an entity directly created by the State is a department or administrative arm of government. See, e.g., Hinds County Human Resource Agency, 331 NLRB No. 186, slip op. at 2-3; University of Vermont, 297 NLRB 291, 295 (1989). In the instant case, there is significant governmental control over the Employer's

¹² The members of the workforce policy board are appointed by the Mahoning County Board of County Commissioners and the Columbiana County Board of County Commissioners. The record suggests that the members of the workforce policy board serve for the duration of the 5-year plan. It does not establish that they are subject to removal by the County Commissioners.

¹³ See Hinds County Human Resource Agency, 331 NLRB No. 186, slip op. at 1, n. 1 (2000); FiveCAP, Inc., 331 NLRB No. 157, slip op. at 1.

budget, auditing and operations. See Hinds County Human Resource Agency, 331 NLRB No. 186, slip op. at 2. All of the Employer's funding comes from government sources and the Employer is audited by the State. Ibid. The Executive Board members are not compensated for serving in that capacity, and the minutes of the Executive Board's meetings are public records open for inspection. City Public Service Board of San Antonio, 197 NLRB 312, 314 (1972). See also Oklahoma Zoological Trust, 325 NLRB 171, 172 (1997). The record suggests that the Employer is a tax-exempt entity. Camden-Clark Memorial Hospital, 221 NLRB 945, 947 (1975). The Employer's employees participate in the state retirement system. Hinds County Human Resource Agency, 331 NLRB No. 186, slip op. at 2 & n. 12. In addition, the enabling state statute, O.R.C. Chapter 167, reveals a legislative intention that entities such as the Employer be operated under local governmental control. Id., slip op. at 1, 2. For example, the enabling statute requires that membership in a council of governments be restricted to its constituent government bodies. O.R.C. § 167.02(A). In addition, the legislative intent of the statute is that councils of governments perform functions that the constituent governments would otherwise perform separately. See O.R.C. § 167.03 ("Powers and Duties"); Ohio Op. Att'y Gen. No. 89-063 (1989)(regional council of governments may perform such functions as its members may perform, although certain functions are within the exclusive authority of the member subdivisions and may not be delegated).

The Petitioner disputes whether several of the above factors are present in this case. For example, the Petitioner argues that the Employer is not required to be audited by the State. The testimony of the Employer's Director, Ray McAtee, establishes otherwise. In addition, Employer's Exhibit 2 is a Memorandum of Agreement for Auditing Services executed by the State Auditor pursuant to O.R.C. § 115.56, a statute that permits a "public office [to] request, and

participate in the selection of, an independent certified public accountant to perform any required audit of the public office, in lieu of the auditor of the state.”¹⁴

The Petitioner also argues that other factors require a finding that the Employer is not a department or administrative arm of government. For example, the Employer cannot levy taxes or exert the power of eminent domain. However, the Board has found an entity to satisfy the first prong of Hawkins even though it had no power of eminent domain. Hinds County Human Resource Agency, 331 NLRB No. 186, slip op. at 2, 3, n. 14, citing University of Vermont, 297 NLRB at 292. Cf. Wilkes Telephone Membership Corp., 331 NLRB No. 98, slip op. at 6 (2000)(employer lacking power of eminent domain, as well as other indicia of a department or administrative arm of government, not a political subdivision).¹⁵

The Petitioner also contends that the Employer is not a political subdivision because it conducts its day-to-day operations and sets its labor policies without the legislative approval of Columbiana and Mahoning Counties. This argument is unpersuasive. An employer’s autonomy in day-to-day operations and in labor relations, by itself, is not dispositive of employer status. Hinds County Human Resource Agency, 331 NLRB No. 186, slip op. at 3 (employer could purchase property, enter into its own contracts, and apply for its own grants); University of Vermont, 297 NLRB at 292 (university’s board of trustees operated autonomously regarding labor relations); Public Service Board of San Antonio, 197 NLRB 312, 314 (1972); Fayetteville-Lincoln County Electric System, 183 NLRB 101, 102 (1970). In addition, O.R.C. § 167.05 permits a regional council of governments to “employ such staff and contract for...services..., and may purchase or lease or otherwise provide for such supplies, materials, equipment, and

¹⁴ See also Ohio Op. Att’y Gen. 98-004 (“[a]s a public office, a regional council of governments must file with the Auditor of the State an annual financial report setting forth its income and expenditures”).

facilities as it deems necessary and appropriate....” Thus, the state law which enables the creation of entities such as the Employer expressly permits those entities to operate and conduct their labor relations policies autonomously. This further erodes the Petitioner’s argument that the Employer is not a department or administrative arm of government because its day-to-day operations are independent of county legislation.

Finally, the fact that the State has not recognized the Employer as a political subdivision is not controlling. As discussed, the Employer’s attorney stated on the record that SERB dismissed the Petitioner’s petition for an election.¹⁶ The Employer argued before SERB that it was not a “public employer” because councils of government are not listed as “political subdivisions.” See O.R.C. § 4117.01(B). Even assuming that SERB dismissed the petition for this reason, however, such state determinations are not controlling in determining whether an entity is a political subdivision under Section 2(2) of the Act. Hawkins, 402 U.S. at 602-603. For the same reason, opinions from the Ohio Attorney General’s office determining that councils of government are not political subdivisions for certain purposes, are not controlling.

In sum, the factors supporting a finding that the Employer is a department or administrative arm of government lead to the inescapable conclusion that the Employer was created by the State as a department or administrative arm of government.

Based on the foregoing, and the record as a whole, I find that the Employer is a political subdivision within the meaning of the Act, and thus exempt from the Act’s coverage, and shall order that the petition be dismissed.

¹⁵ The Board in Wilkes did not address the jurisdictional issue, which was decided by the administrative law judge, because it found no violation of the Act. Wilkes Telephone Membership Corp., 331 NLRB No. 98, slip op. at 1, n. 1.

¹⁶ See note 8, *supra*.

ORDER

IT IS HEREBY ORDERED that the petition filed herein be dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by September 11, 2001.

Dated at Cleveland, Ohio this 28th day of August, 2001.

/s/ John Kollar

John Kollar
Acting Regional Director
National Labor Relations Board
Region 8

177-1683-5000